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No. 833

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

BOSTON AND MAINE CORPORATION,
Appellant,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
NORFOLK AND WESTERN RAILWAY COMPANY, ET AL.,
Appellees.

On Appeal from the United States District Court For the Southern District of New York

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REPLY OF BOSTON AND MAINE CORPORATION TO MOTIONS TO AFFIRM

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TABLE OF AUTHORITIES

Cases	Page
Baltimore & Ohio v. United States, 386 U.S. 372 (1967)	5
Eastern-Central Motor Carriers Assn. v. United States, 321 U.S. 194 (1943)	5
New York Central Securities Corp. v. United States, 287 U.S. 12 (1932)	4
Schwabacher v. United States, 334 U.S. 182 (1948)	3, 5
Southern Class Rate Investigation, 100 I.C.C. 513 (1925)	5
Statutes	
Administrative Procedure Act, 5 U.S.C. § 1007(b)	4
Other Authority	
Practices and Procedures of Governmental Control of Transportation, H.R. Doc. No. 678, 78th Cong., 2d Sess., Vol. 9, p. 53 (1944)	5

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Appellant, Boston and Maine Corporation (B&M), hereby replies to the motions of the United States, the Interstate Commerce Commission, Norfolk and Western Railway Company, and the State of New York [1] to affirm the

[1] While the Delaware & Hudson Railroad Corporation has moved in all of the consolidated proceedings for affirmance of that paragraph of the judgment below which dismisses B&M's complaint, D&H's motion does not argue against B&M's appeal in No. 833. Rather, D&H requests that any remand based on B&M's appeal should be "without prejudice to the right of EL and D&H to proceed to enforcement of the Commission's provision for their inclusion in N&W." B&M agrees with D&H in that regard (J.S. No. 833, pp. 19-20). Therefore, this reply does not respond to D&H's motion.

order and judgment of the three-judge court below insofar as it dismissed B&M's complaint.

N&W takes the position that no substantial question is presented by "B&M's belated attempts to discredit its own witness" since the control savings estimates presented by B&M's witness William Wyer "were fully accepted by the Commission." [2] N&W alleges that B&M's witness made a thorough study of control savings "under circumstances which obviously presented every incentive . . . to maximize his savings estimates . . . ." [3] N&W is incorrect. No such incentive was present. B&M sought and emphasized merger, as contrasted with control. B&M requested that, in the event the Commission should direct control, B&M be credited with merger savings because (a) N&W witnesses had revealed that N&W would substantially integrate the operations of subsidiaries under control, and (b) control would be a temporary arrangement followed by merger.

The State of New York admits [4] that the Commission believed that control savings would exceed those claimed by B&M's witness, but agrees with the district court that the Commission "was not bound to attempt to price these out into increased earnings without the aid of detailed evidence and B&M had not furnished this" (citing J.S., No. 779, B-55). New York also argues that B&M was afforded a fair opportunity to present its case to the Commission. Those contentions are discussed below.

The United States and the Commission urge summary affirmance on the ground that B&M's "objections are directed to matters committed to the expert judgment of the agency which are not appropriate for judicial review,

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[2] N&W Motion to Affirm, p. 2.

[3] Ibid.

[4] State of New York Motion to Affirm, pp. 22-23.

at least at this level." [5] They employ the tactic of dismissing lightly the challenges of B&M (and N&W) to terms of inclusion with the concession that B&M (and N&W) made "some effort to phrase [their arguments] in procedural terms." [6] Obviously the Commission's actions in this case are not proven "arbitrary and capricious" or "without rational basis" merely because B&M so designates them. However, analysis of the Commission's treatment of terms for B&M inclusion demonstrates that its performance here is of the type that gave meaning and content to those "procedural terms."

The *N&W Inclusion* case was unique because in it the Commission itself was called upon to *determine the type of inclusion* and *set the value* of the included railroads. The adversary parties, of course, could present evidence as to the basis on which the petitioners should be included (or excluded), and they could suggest terms of inclusion. As in the usual case, the Commission was charged with the task of determining whether the inclusions were in the public interest, but it could not take the further step of directing inclusion unless it arrived at terms of inclusion which were equitable and consonant with its findings as to public interest.

Even such precedent as *Schwabacher* v. *United States*, 334 U.S. 182 (1948), which stresses the affirmative nature of the Commission's responsibilities in rail consolidations, does not fully delineate the scope of the Commission's duty in this unique case, for it does not deal with situations in which the Commission is obliged to determine in the first instance both the type of consolidation which would take place and the value of the included lines upon such consolidation. The Commission concluded

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[5] Motion of United States and Interstate Commerce Commission to Affirm, p. 17.

[6] Ibid.

that the type of N&W-B&M unification it found would occur [7] as the result of its inclusion order was in the public interest, but failed to dictate inclusion terms which were consistent with its findings as to unification. Instead, it erroneously adopted terms of inclusion based upon a different and lesser degree of unification.

There is no validity to the claim of N&W that B&M is attempting to discredit its own witness when it objects to the Commission's failure to match its findings as to B&M's value with its findings that the inclusion is in the public interest because "substantial savings" and substantial unifications will occur. B&M's witness clearly spelled out the bases upon which he testified as to value. If the Commission had found that N&W would operate B&M under control as a non-integrated subsidiary, as he had hypothesized, then B&M would have no complaint over the use of Wyer's figures as to control savings. The Commission, of course, could not have directed B&M inclusion under those circumstances unless it also made the prerequisite finding that inclusion of B&M on that basis would serve the public interest.[8]

But the Commission did not agree with the Wyer hypothesis—it found that substantial, identified unifications would be realized. Accordingly, it was the Commission's

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[7] 330 I.C.C. 794.

[8] The Commission's finding that inclusion of the three petitioners is in the public interest was not a mere recitation. It drew essential support from subsidiary findings that specific unifications and "substantial savings" would occur. "[T]he term 'public interest' . . . is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities . . . ." New York Central Securities Corp. v. United States, 287 U.S. 12, 25, 26 (1932). Without the subsidiary finding of substantial unifications and savings, the Commission's public interest finding can not stand. Administrative Procedure Act, § 8(b), 5 U.S.C. § 1007(b).

duty, as this Court held in *Schwabacher*,[9] to see to it that B&M shareholders would be fairly compensated for the value they would contribute to the enlarged N&W system. Instead, the Commission arbitrarily and capriciously evaluated B&M shares on the basis of what B&M's dollar contribution would be if the operations of N&W's subsidiaries were not integrated.

If the Commission felt that it could not, on the record before it, determine the dollar value of the "substantial savings" it found, it was the Commission's *duty* to see to it that the record was completed. Mr. Justice Brennan observed in his concurrence in *Baltimore & Ohio* v. *United States*, 386 U.S. 372, 429 (1967):

> "The ICC is pre-eminently an agency 'directly and immediately concerned with the outcome of virtually all proceedings conducted before it. It is not intended to be a passive arbiter but the "guardian of the general public interest," with a duty to see that this interest is at all times effectively protected.' H.R. Doc. No. 678, Practices and Procedures of Governmental Control of Transporation, 78th Cong., 2d Sess., Vol. 9, p. 53 (1944); see *Southern Class Rate Investigation*, 100 I.C.C. 513, 603. It is empowered to investigate and gather evidence beyond that presented by the parties where exercise of that power will advance the determination of what best serves the public interest. [citing, *inter alia*, *Eastern-Central Motor Carriers Assn.* v. *United States*, 321 U.S. 194, 208-10, 212, 216-17]"

A suggestion by the Commission to the parties that it wished to consider evidence as to savings (and traffic gains) under the type of control arrangement it found would occur would have brought an immediate response from B&M and, we are certain, from its co-petitioners and adversaries as well.

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[9] 334 U.S. 182, 199 (1948).

Should both of N&W's appeals prevail, the Commission's failure to set a reasonable value for B&M will do severe damage to the public interest (1) in delaying the public's realization of the benefits of the Penn-Central merger, (2) in delaying the inclusion of some or all of the three smaller carriers in N&W, and (3) possibly in the cessation of the service of the New Haven. It is B&M's view that the Commission error, serious though it is, can be remedied by remanding only the question of the terms for B&M inclusion to the Commission while permitting prompt realization of the other transactions at issue.

CONCLUSION

The Commission's ultimate finding was that B&M's inclusion in N&W is in the public interest and should be directed on specified terms which the Commission called equitable. Those terms were based upon a computation [10] which credited B&M with a contribution to annual system savings of only $328,471, a figure based expressly upon the assumption that the most minimal savings would be realized.[11] That finding is without rational basis in, and indeed conflicts with, the Commission's subsidiary findings that substantial savings will result from identified and far-reaching unifications. The Commission acted arbitrarily and capriciously in applying the dollar figure for minimal savings in the face of its finding that substantial savings would occur. The case should be remanded to the Commission for further proceedings as to B&M's contribu-

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[10] 330 I.C.C. 821, 857-58.

[11] 330 I.C.C. 857. There, savings resulting from N&W control of B&M are placed at $328,471 per year. As explained in B&M's briefs and Jurisdictional Statement, a correlative error occurred with regard to traffic gains.

tion to N&W system savings and as to its correspondingly greater contribution to N&W system traffic gains or, alternatively, for denial of B&M's petition for inclusion on the ground that the Commission has failed to find terms of inclusion equitable to B&M.

Respectfully submitted,

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